



Constitution Committee

Corrected oral evidence: The role of the Lord Chancellor and the law officers

Wednesday 8 June 2022

11 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie.

Evidence Session No. 6

Heard in Public

Questions 67 - 79

Witness

I: The Rt Hon the Lord Mackay of Clashfern, former Lord Chancellor, Lord Chancellor's Department (1987-97); former Lord of Appeal in Ordinary, House of Lords (1985-87); former Judge, Supreme Court of Scotland (1984-85); former Lord Advocate, Crown Office and Procurator Fiscal Service in Scotland (1979-84); Lord Clerk Register of Scotland and Keeper of the Signet, National Records of Scotland and Registers of Scotland.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witness

Lord Mackay of Clashfern.

Q67 **The Chair:** Good morning, Lord Mackay.

Lord Mackay of Clashfern: Good morning.

The Chair: It is wonderful to see you here. We are being recorded, so I would like to confirm that today the committee will be hearing evidence from the Rt Hon the Lord Mackay of Clashfern, former Lord Chancellor and former Lord Advocate at the Crown Office and Procurator Fiscal Service in Scotland, together with a long list of other distinguished appointments. Thank you for coming today and sharing your considerable knowledge, experience and wisdom with us. I know that it is going to be of great value.

Lord Mackay of Clashfern: I am glad to be here and very thankful to be asked. I am not so sure about what I can share with you, but we will find that out as the time goes on.

The Chair: As you would expect, we have several questions that we would like to ask you. Hopefully, you have had a sense of where our interest is. Before we do that, are there any opening comments or reflections that you would like to make to the committee?

Lord Mackay of Clashfern: As you all know, there have been major changes in both the Lord Advocate's functions and the Lord Chancellor's functions since I held those appointments. Therefore, what I say, in so far as it is relevant, will be about my time, when things were rather different.

I am expecting to retire in the summer, on the day after the session closes. As part of my final speech, I intend to set out a summary of what these jobs were, because they have changed completely. I think that it would be good to have on record what I thought they were, making no comment in that connection on what they are now. That is not part of it. These speeches are supposed to be non-controversial. I think that mine will be non-controversial—history, rather than anything else.

Q68 **The Chair:** In order to understand how things have changed, you need to know what the history is and what was good and not so good in the history, so the terms of your contribution are still extremely valid in relation to the work that we are doing.

May I open with the first question? It goes to the heart of what we are looking at in our investigation into the role of the Lord Chancellor and the law officers. How would you define the rule of law? What do you see as the role of the Lord Chancellor and the law officers in protecting it within government?

Lord Mackay of Clashfern: As far as definition is concerned, I commend Lord Bingham's book as one of the best books not only on this subject but on legal subjects generally. I have tried to think about this.

My view is that the rule of law says that, if an Act applies to a person, in the circumstances that prevail he or she is obliged to follow that rule, whatever it is, but if there is no such rule the person is free to do what he or she likes.

The Chair: What is the role of the law officers in protecting it within government? What do you believe that discharging that element of their role entails?

Lord Mackay of Clashfern: I am fairly clear about that as it was, and I think that it should probably be so still. First, the Attorney-General is the senior law officer of the Crown. He or she is an adviser to the Crown and an adviser to the Cabinet. I think that I am right in saying that he or she also happens to be an adviser to both Houses of Parliament. The Attorney-General is intended to be independent but is still a member of the same party as the Government. He or she has a role that is independent and is responsible for giving legal advice to the Government. That legal advice should be based on what he or she understands the law to be. If he or she feels that it is a specialist area into which he or she does not wish to go, he or she is perfectly entitled to get help from other counsel, employing senior counsel, if necessary, to advise on these issues.

That is the role of the Attorney-General. I do not see that that involves anything to do with the rule of law, except, of course, the responsibility to give correct views of what the law is when that question arises.

My view is that the Lord Chancellor has the responsibility of bringing to the notice of the Cabinet any question that he knows of in the Administration that is a question of law. Whether or not it is a breach of the rule of law will certainly be such a question. If it is raised, it is not his business to advise on it. It is his business to advise the Cabinet to take the legal advice that it has, which is from the Attorney-General.

These are my views on what the rules were. I think that they are still the rules. The noble and learned Lord who has just appeared will know more about the present situation than I do. As far as I have been able to judge, it remains the same in that respect.

Lord Falconer of Thoroton: I apologise for being late.

The Chair: When we took evidence from Lord Keen on the issue of the law officers giving advice, he made an observation, which I will read. He said, "There are times when the law officers will advise that a particular course of action is 'respectable'. I have to observe that that is a fairly low standard". Do you have any comments on the issue of whether there is a standard?

Lord Mackay of Clashfern: As you know, I was the Lord Advocate a long time ago now, but my view was that the law officers' job is to be convinced about what the law is: what is the right answer to this legal question? You know as well as I do that lawyers do not always agree with

one another, but I think that it is the job of the Attorney-General to formulate, with help, if necessary, the correct view of what the present law is on the subject. I have no place for any sort of secondary level or anything like that.

The Chair: Lord Hennessy, you wanted to develop a point on the rule of law.

Lord Hennessy of Nympsfield: Lord Mackay, I wonder whether I can tempt you to do something for the committee that I asked Lord Burnett about a few weeks ago. As our inquiry has gone on, I have been struck by something more and more, as a former university teacher. I know that you were a university teacher when you were a young man. I cannot remember whether you taught law, but I know that you taught maths. When I was teaching the odd constitutional history course, I could have done with a template against which my students tested in their own minds lawfulness—the degree to which the rule of law was being followed by particular Governments in particular circumstances. As we are sadly going to lose your day-by-day wisdom with us in the Chamber, I wonder whether you could leave us a kind of Mackay of Clashfern template that we could test against future Governments in your absence.

Lord Mackay of Clashfern: I am not sure what the right answer to that question is. It is quite difficult. If I have spoken in the Lords, as I have done rather a lot since I retired from both of these offices, I have tried as best I can to say what I believe the law is and not to be concerned with what the Government want or do not want. If it happens to be what the Government are wanting, that is just good from that point of view.

I have understood that the tradition has always been that the Lord Chancellor, when he retires, becomes a member of the group that put him in that office. In my view, that does not damage in any way the duty of the Lord Chancellor to be as honest with the law as, hopefully, he was when he was Lord Chancellor.

Lord Hennessy of Nympsfield: Is that a yes? Are you going to provide us with something, or perhaps not?

Lord Mackay of Clashfern: No. No way, it is not my responsibility to do that. I have done my best. If people want to follow it, well and good. In answer to your question, I have tried to explain what I have done about it.

Lord Hennessy of Nympsfield: I have a quick follow-up. When Lord Judge was with us, he tweaked Tom Bingham's definition just a little bit. Do you want to tweak Tom Bingham's definition of the rule of law, as he put it in that wonderful book?

Lord Mackay of Clashfern: I think that this is the best exposition that you can have. I did not expect to expound the law to that extent in this evidence, because to read that book would take more than two hours. The book is extremely interesting. For anybody who is interested in

knowing what the rule of law is, where it has come from and, in particular, its application to different fields, which some of the later questions may be about, it is very useful and important. I learned quite a lot about that when I was a very junior in the original *Burmah Oil* case. The exposition of international law there was quite important. I learned a bit about it at that time and have learned a little more from time to time since.

Lord Howard of Lympne: Would you not agree that it is often quite difficult to predict how the Supreme Court will come down on one side or the other of a particular issue and, therefore, quite difficult to give definitive advice on what the law actually is? In those circumstances, is it not perfectly reasonable for the Attorney-General to say, "I can't tell you whether or not this argument would succeed, but it is a respectable argument. It might succeed, but it might not"?

Lord Mackay of Clashfern: That seems to me to be a certain view about the Supreme Court, which I am not sure that I would necessarily follow quite in the words in which you put it. I think that the Supreme Court will fully explain why it took the view that it did. That view will be based on the law as it is. My view, on the whole, is that the Supreme Court reaches a decision that one would expect it to reach in the circumstances, as long as you know completely what the facts are on which its decision is based.

As I said, the lawyers sometimes differ. I have found from time to time that the court that I was addressing has taken a different view of the law from me, but that has been very infrequent in my experience. On the whole, the court has followed the law as, after a bit of study, I have understood it.

The Chair: Staying with the rule of law, Lord Howell has a question on the issue of international law.

Lord Howell of Guildford: Good morning, Lord Mackay. You have twice referred to the late Lord Bingham and his works. Of course, he was very strong on international law being respected in the same way as domestic law and said that there should be no question of breaking it. Is it entirely your view as well that international law—which, after all, often involves a treaty that Parliament may have approved in a statute and that has been agreed by the Government, although circumstances can change—is exactly the same as domestic law?

Lord Mackay of Clashfern: International law, if you describe it in that way, is a very complicated subject. There are many different parts of it. For example, a treaty that has been signed by Her Majesty's Government and has come into force will be binding on Her Majesty's Government. It does not follow that it will be a law in our country, unless and until it has been made a statute in some shape or form here.

We have a lot of these, and I have sat in decisions on some of them. For example, there is a treaty that lays down air passenger law. In the case

that I am thinking of, it has been made part of the law of the United Kingdom. If so, the courts in the United Kingdom have a duty to apply it, where it arises.

Of course, what the judges in the United Kingdom say is the correct interpretation of that law may be different from what the judges in France, Germany or somewhere else thought about it. Our courts are bound to decide what they think is the right construction of that particular treaty. Obviously, the other decisions, if there are any before we are advised to make a decision, are very helpful, but they may not always be absolutely convincing. The rule of law is really in connection with the way in which it is interpreted by our courts if it is brought before them.

Then there is more general law: the Geneva conventions and things such as the law of the sea. As you know, the law of the sea is a very long and fairly complicated document, but it is generally thought to be universally respected. It is a question of the attitude of Governments to these particular rules.

I regret to say that I do not think that every Government has the same attitude to some of these rules that we have. The present situation in Ukraine seems to be an example, where the rules are not respected in the same way by Russia as they are by what we think about them.

There is a lot of complication under this. Lord Bingham refers to that. He was very keen, and very wise, to say that we should respect that sort of thing, but it is not a universal thing like the domestic law of the United Kingdom, which is much easier to define, at least in the sense of identifying what it is.

Lord Howell of Guildford: Thank you very much. That was a very full and very helpful answer.

Lord Howarth of Newport: Good morning, Lord Mackay. In these vertiginous and anxious times, we need more than ever the wisdom of the elders. We shall be very much the poorer after your retirement.

Since the 2005 reforms, the role of the Lord Chancellor is no longer so senior in Cabinet. The incumbent is likely to be a career politician and may well not be a lawyer. That means that responsibility for ensuring that the Government keep to the straight and narrow and conform to the rule of law rests more than it did on the Attorney-General. However, the pool of lawyers available in the House of Commons to be appointed Attorney-General has shrunk.

It might also be thought that the modern generation of politicians does not have the same grasp of history, the importance of which you referred to, or of the principles of the constitution. In those circumstances, do you think that the rule of law is more at risk?

Lord Mackay of Clashfern: It is becoming more difficult, as you have said, to get a law officer in the House of Commons, as the number of

practising barristers there has tended to shrink. As I understand it, there is nothing to prevent the Government appointing as a law officer somebody who is not a Member of either House of Parliament.

When I was appointed Lord Advocate in 1979, I was invited to a dinner that the party gave for the Government when it came back to government after a lengthy period of delay. I went to a table where the host was the Chief Whip. As I went there, he said to me, "You know, you're the only person here who is not a Member of either House of Parliament". I was the Lord Advocate, of course, by that time, so it is not essential. It has been usual. I am asked in one of the questions whether it is a good thing. On the whole, I think that it is a good thing for a law officer to be a Member of Parliament, because he or she can explain the law as they believe it to be to the House of Parliament when it is considering the matter at issue.

Lord Howarth of Newport: Just now you said that you understood that the role of the Attorney-General was to be available to advise both Houses of Parliament. Would it not be significantly disadvantageous if we could not find an Attorney-General in either House?

Lord Mackay of Clashfern: Yes. I remember seeking in some committee the advice of Peter Goldsmith when he was Attorney-General. He came to a committee of the House of Lords in accordance with the obligation and gave his evidence. I think that that is possible whether you are a Member or not. On the whole, as I said, it is best if it is a Member because the exposition can be made freely in the House itself, whereas otherwise it is usually on request from a committee.

Lord Howarth of Newport: Do you think that the Attorney-General should be in some sense accountable to the House? That raises many issues about the confidentiality of his advice and his responsibilities to the Cabinet, as opposed to Parliament.

Lord Mackay of Clashfern: I do not know exactly what the present situation is. I know that when I was Lord Advocate I sometimes had to explain to the United Kingdom Cabinet something that had happened in the criminal situation in Scotland. I always felt that I was very respected. One of my friends was Lord Carrington, who often commented to me afterwards on the impression that I had made on his colleagues in my observations. That was usually rather encouraging, which is why he did it.

The Chair: Before we move off this question, I have two quick questions. How integral to the definition of the rule of law is the independence of the judiciary? Can you have a definition of the rule of law that is acceptable to you that does not require the independence of the judiciary?

Lord Mackay of Clashfern: It is a consequence of the rule of law that the judiciary should be independent. The judiciary is one of the branches of our constitution, the others being the legislature and the Executive. The judiciary has an important role in our constitution. Various things

have happened to affect that role since I held the office of Lord Chancellor, but it is extremely important that the judiciary is independent. I did my best, I hope, to secure that during the time that I was Lord Chancellor. It was not possible always to regulate everything that every Cabinet Minister said in relation to the judiciary, but generally speaking—there are some here who know whether or not that was true—our Cabinet was pretty respectful to its Lord Chancellor, to the rule of law and to the independence of the judges.

The Chair: I have one final point. Do you think that the Ministerial Code should be updated explicitly to reflect the duties of the law officers?

Lord Mackay of Clashfern: I am not entirely certain what the object of the Ministerial Code is. Is it a ruling of the Cabinet in which a particular Prime Minister presides, where he is saying, "This is what I expect my Ministers to do"? That is one possibility.

The other is that the Ministerial Code is an absolute rule: an absolute obligation on any Minister, in any Cabinet, however constituted. On the whole, I think that most people would regard the second as the likely way of focusing on the Ministerial Code. If so, the code should be independent of the Government but should reflect the rule of law and the general law of the country in its detail.

The Chair: We will move on to another subject: the political culture in which the law officers have to operate. Lord Robertson has a question.

Q69 **Lord Robertson of Port Ellen:** Lord Mackay, do you detect a shift in recent years in the political culture within which the law officers and the Lord Chancellor operate?

Lord Mackay of Clashfern: I cannot be sure of that, but I certainly think that the way in which the Lord Chancellor's office is now constituted makes it mightily difficult for him to behave in the way in which I was able to do in relation to the judiciary.

I remember that when I was Lord Chancellor I went to the annual general meeting of the justices' clerks. The retiring chairman of the justices' clerks told me that he had been at an international function somewhere and somebody had asked him, "Who is the Minister who is in charge of you?" He said, "It is the Home Secretary". The man said to him, "But the Home Secretary is responsible for prisons, and you are the justices' clerk. Are you supposed to have responsibility for a prison?" That was an interesting interlude. I am glad to say that not very long after that the justices' clerks were moved from the Home Office to the Lord Chancellor's Department.

It is difficult to have a department that has quite different aims in the various institutions that it contains. When I was Lord Chancellor, I had things such as the Law Commission, the office in Kew and the Land Registry, for example. There was nothing contrary to one another in that. Obviously, there was a slight counter-interest in money, but it was always felt that each of them could be analysed separately. The more

complicated the department is, the more difficult it is for the Minister to sort out the money issue.

I think that there is a question about that. For example, if you want to help to keep numbers in the prisons a bit lower, you might want to raise legal aid to the criminal justice department in order to make sure that people are properly represented and, therefore, that on the whole fewer people are convicted.

There are issues of that sort, which I did not have to deal with. It is true that most of the things I was concerned with had a common interest.

Lord Robertson of Port Ellen: Would you like to comment on the political role of the law officers? They are Members of Parliament. The Attorney-General is a Member of the House of Commons and she is pretty active in the political sphere, giving points of view and opinions about things that might well have to do with the law. When Lord Judge gave evidence, he said, "I do not think it helps at all for any of them"—the law officers—"to be making public statements about political issues ... The more we treat them as political, the less weight is attached to them in relation to the rule of law because they become ... mere politicians". Reflecting on your own experience as the Lord Advocate, do you think that the law officers should refrain from the mere argy-bargy of politics?

Lord Mackay of Clashfern: Politics is a fairly comprehensive subject, and those who take part in it should know pretty well and have an idea of what their function is. I had not had anything to do with Parliament before I became Lord Advocate. It was a surprise to me; I was really a lawyer, of a kind, up to then. I found myself in a situation where you have to think about politics and the prevailing attitudes that people have.

One of the things that I have found in relation to the judiciary is that there were certain points of view that were pretty prevalent in the general area of the judiciary that they were not very sensitive to. It was my job to try to make sure that that kind of thing was appreciated, and there is an element of discretion in what you should be saying. Certainly, it would be very awkward if you started to give political views about what the law should be on a subject that is current in Parliament or in the Cabinet. The law should not be judged by what the political situation is; the law should be judged by what we understand it to be in the statutes, decisions and so on. I can see why Lord Judge made the comments that he did and I respect his view.

Lord Robertson of Port Ellen: I am interested in your view. The current Attorney-General recently said that the Conservative Party needs to "stamp out this long tail of Blairism", including "creations like the Human Rights Act and the equalities agenda, which has built up a whole industry of people". Do you think that that is straying into a sensitive area?

Lord Mackay of Clashfern: I do not think it is my business to judge other people. It is difficult enough to judge myself, so I would rather not

express a view about that. You might guess what my private view is, but I do not think that I would like to express it when she is in the role of Attorney-General in the Government.

Lord Robertson of Port Ellen: Lord Judge also told us that he thought that combining the role of Lord Chancellor with Deputy Prime Minister was not a good idea, as it would not leave him enough time to be Lord Chancellor if he also had to be Deputy Prime Minister. Do you have a comment on that?

Lord Mackay of Clashfern: He has a pretty big job as it is without having to carry out the job of Deputy Prime Minister, but of course he did it, in a sense, when the Prime Minister was ill, and he seemed to manage.

The amount of responsibility a single individual can carry properly is limited. There are very few people who can do everything well in a situation like this where there are so many different offices and so many responsibilities of rather different kinds within the office that Mr Raab currently holds.

The Chair: May we move on to the modern role of the Lord Chancellor? Lord Hope, you have a question.

Q70 **Lord Hope of Craighead:** Yes. When the time comes, we obviously have to express a view in our report on the difference between the position as it was in the past and the modern role as it now is. At the beginning of this session, you said that you recognised that things are rather different from what they were when you occupied the position of Lord Chancellor, but you also told us that in your valedictory speech you propose to make no comment on anything that was controversial. I think we can all understand that.

Will you assist us a little more in this session on one or two particular aspects? The first one I would like to focus on is length of tenure. I think that you were Lord Chancellor for about 10 years. Am I right? It was something very close to that, at any rate.

Lord Mackay of Clashfern: Yes. As you know, I came to the Lord Chancellorship as a Member of the Judicial Committee of this House. Not many had come that way, and I regarded that as a pretty important matter from my point of view. I was very concerned by being the Minister who nominated senior judges: first, the very senior ones to the Prime Minister, and the other senior judges to the Queen. I regarded it as my job to make as sure as I could that the people I was nominating were able to do it properly. They were usually going to be there for a considerable time because of the security of tenure, which is essential for the judges to have.

I regarded myself, rightly or wrongly, as having an ability to find out whether people were really judges. Advocates and judges are not the same. A very successful advocate may not be a good judge—and conversely. Therefore, it was my job to try to find out. I took quite a lot of precautions about that in the way I was able to find out what people

were. Of course, there was documentation—comments that the office had taken from judges—but I did not regard that as very important if I knew the person in question, and I made it my business to try to know the people I was appointing at the senior level.

I could not do that for district judges or circuit judges. Eventually I thought the thing to do about that was to have a committee to judge them, with a magistrate who had responsibility for judging in the ordinary course included.

Some things depended on how you came to the office and what you could do or how you could conduct yourself. Now, it is a very different system. As you know, it is not without adverse comment in the newspapers, sometimes, for other reasons.

On the whole, it depends a bit on who is available to fill the office.

Lord Hope of Craighead: Length of tenure was important to you in gathering the information that you have been describing to us. It must have taken some time for you to build up the knowledge that you certainly had about the candidates, their backgrounds and so on. You could not do it in a matter of six months or so, to occupy the office in the way that you did as time went on. So does length of tenure matter to the holder of the office of Lord Chancellor?

Lord Mackay of Clashfern: It is a question really of what is available. The present situation is that there is no judge in the Cabinet at all, and I do not think it is likely that there will be one for some time, whether there is a reshuffle or not. You have to judge how this is best done by the sorts of people who are available and the backgrounds that they have. The more they have that would be sensitive to the law, the better.

Lord Hope of Craighead: You moved to the position of Lord Chancellor having served as a Law Lord for a time, but you had the background of being a law officer. How long did it take you, when you moved to the office of Lord Chancellor, to really feel that you were on top of the job and able to give—

Lord Mackay of Clashfern: I think it is right to say that in the past, before my time, the office was held for a substantial period. I happened to be the person who held it longest continuously among anyone appointed in the last century, because I had it for almost 10 years. Lord Hailsham had it for four years and then eight years, so he had it longer cumulatively but not continuously. I must say that I thought it an advantage to have it for some time. That is a matter that really the Prime Minister has to judge, and the Prime Minister could have dispensed with my services any time if she or he had wanted to, but, fortunately for me, I resigned myself when I came to be near 70.

Lord Hope of Craighead: My question really was: how long do you think it took you to feel that you were on top of the job as Lord Chancellor?

Lord Mackay of Clashfern: It depends how much you know about the job in advance. When I was appointed Lord Chancellor, somebody commented that if he had known he was going to be head of the Scottish system he would have liked to know something about it before he went to take it on. Generally, some people felt that I did not know what I was taking on. Of course, I had a good deal of experience of working with English barristers and Silks, and I had taken a few cases in the House of Lords that were primarily English cases.

It is really a question of what is available. I happened to be the person thought to be suitable at the time I was appointed, but I cannot think of anybody at the present moment who would be qualified in the same way who would want to take it on.

Lord Hope of Craighead: If we were to take the view that the Lord Chancellor should remain in post longer than has been the case in recent years, do you have any advice to give us on how that could be achieved?

Lord Mackay of Clashfern: So long as the Lord Chancellor is doing a reasonable job, the longer he is in it, generally speaking, the better. Saying that, it is very difficult to see how you can make that a practical matter in the present situation. It just shows you how it happened in the last reshuffle.

Lord Hope of Craighead: As far as judicial appointments are concerned, the position is entirely different from the position that you held as Lord Chancellor, but nevertheless the Lord Chancellor is consulted, along with many other people, when recommendations are being made to appointments to the Supreme Court, for example. Do you think that in the present situation the Lord Chancellor is able to play a meaningful part in giving advice on whether the candidate is suitable?

Lord Mackay of Clashfern: I do not know; it depends how close the Lord Chancellor in question is to the profession and what he or she knows about the profession and the different people in it, and so on. I should think, for example, that the previous Lord Chancellor—the one before the present one—knew more about the English Bar than the present one, but I may be wrong in that, because he is a solicitor as well. It is just a question of what they know. Of course, it is also a question of what they are prepared to find out, because that is an aspect that can be open once they are appointed, which is quite important.

Lord Howard of Lympne: Lord Mackay, following up on the question that you have just answered, Baroness Hale has said that the current arrangements for judicial appointments place the Lord Chancellor in an almost impossible position, and at least one recent former Lord Chancellor has written about the difficulties that he faced. Do you think that there is a case for looking at the current arrangements and possibly adopting one proposal that has been made for a panel to appoint a shortlist from which the Lord Chancellor would make the final selection?

Lord Mackay of Clashfern: In a way, if it is too narrow, the Lord Chancellor loses options that he or she may be able to feel opened, apart from that, but a professional panel might well be able to help to focus on the people, and the Lord Chancellor could then find out a bit more about them, so long as he has a little time in which to do so. Of course, one of the problems is that, if appointing judges takes a long time, it is very damaging to the judicial system because there are vacancies.

I had an experience of that which I remember quite strongly. I was agitating—I suppose that is the right word—to increase the numbers in the Court of Appeal and, suddenly, to my intense gratification, they decided to do that. Of course, there was an immediate vacancy in the courts below, and to get new people into that immediately was quite a job. Some people were complaining that there was no judge in the City, or something. I did my best to get the judge into the City as well as possible, but there are difficulties of that sort. If the Lord Chancellor is to have a meaningful chance in this, he needs a bit of time to know the people put forward, whereas at the present time I do not think that there is allowance for that, so far as I know.

- Q71 **Lord Faulks:** Good morning, Lord Mackay. You have referred to the fact that the position of the Lord Chancellor has changed very significantly, certainly since 2005. The current Lord Chancellor is also Secretary of State for Justice, quite apart from being Deputy Prime Minister. Looking back to your experience as Lord Chancellor, do you think that responsibility for prisons would have made your job easier or less easy? How would you have regarded that?

Lord Mackay of Clashfern: I would regard it as incompatible with what I was trying to do. As I was saying, the organisations for which I had responsibility, such as the Law Commission and so on, were all in a sort of common purpose. Prison has a different purpose entirely, and there is a degree of conflict between these two different groups. I cannot tell you exactly how that is handled now, but it is a challenge to me and, as I said, it was a challenge to the president of the judges' clerks association when he was challenged with it by another nation.

It seems quite wrong. I remember when I went as a sheriff principal to Argyll that I had to deal with a case about the extension of a borough, and I found myself having to go into the hearing through the police station. I felt somewhat that that was not quite appropriate. The union of the police and the court was not quite right. That is just a remembrance of what happened. It is very difficult, but I do not say at all that it is impossible for people to be able to handle these different and conflicting—as it seems to me—responsibilities.

Lord Faulks: On the question of conflict, the Ministry of Justice is a big spending department. It is also, we understand, the subject of more applications for judicial review than any other department, whereas it was formerly the Home Office. Do you see any potential conflict with the job of the Lord Chancellor to ensure that there is a properly functioning court system and at the same time he or she is a Cabinet Minister, having

to deal with orders to restrain spending or to reflect in the way that he or she manages the department the financial constraints that may be imposed upon them? How comfortable would you have felt—or did you feel—with spending constraints consistent with your duty as Lord Chancellor?

Lord Mackay of Clashfern: I did my best to make these the minimum, and on the whole most of the other departments thought we were pretty well served. When I look back on it, I was able to keep legal aid going in a way that has not happened very much since. It is really a question of what you can concentrate on. We are all just ordinary human beings, and the idea that you can think of everything at the same time is quite a challenge for the best.

The Chair: Thank you. Baroness Suttie, you had a question on Lord Chancellors and annual reports.

Q72 **Baroness Suttie:** Good morning. Do you think it would be helpful for the Lord Chancellor to have to produce an annual report in front of Parliament? If so, what should it include?

Lord Mackay of Clashfern: It is difficult for the Lord Chancellor to do that if he has a whole lot of other responsibilities as well, but the Lord Chief Justice puts a report before Parliament, as I understand it, and he is open to questions about it.

When I was Lord Chancellor, I was often summoned to the Home Affairs Committee, and I remember quite a lot of interesting debates about things that were then issues that seem to have now disappeared. I was giving an account to Parliament pretty regularly, with questions, rather like I am doing now, and that was right.

If it were just a report, it is difficult to know what people are interested in. I have seen some reports come out that on the whole I have not found it necessary to read in full detail, and it is possible that these could be unnecessary. The option of having the Lord Chancellor or any other Minister before the important committee is perhaps the easiest way of dealing with this matter. Of course, it will be questions that people are interested in that he or she will have to answer.

Baroness Suttie: Do you think there are other ways in which the Lord Chancellor could be accountable to Parliament?

Lord Mackay of Clashfern: In the House of Commons he has a Question Time, and any question that refers to the Lord Chancellor presumably has to be dealt with in that time. In my day, the Lord Chancellor in the Lords answered questions for the Government, particularly about his own department—for example, about writs and that sort of thing. I remember having to answer quite a few suggestions about mistakes that had been made in handling things with the Republic of Ireland. These were just the questions of the day that happened to be interesting. On the whole, that is a better system than having an

obligation to report, unless you specify very clearly what the report must be about.

Lord Howard of Lympne: Is it the case that when you were Lord Chancellor you had to answer for the Government in the House of Lords on issues that went beyond your department?

Lord Mackay of Clashfern: Sometimes, yes; it just depended. Generally speaking, as you know, the rule in the House of Lords is that, if you are representing the Government, you are representing the Government, and you cannot say, "Oh, that's some other department's responsibility. I'm sorry, I can't answer that". That is not an excuse that is open because you are representing Her Majesty's Government. I just answered any questions that they happened to allot to me, and on the whole I had no objection to doing it.

Of course, I had to make sure that people understood that I was answering for the Government; I stood aside from the Woolsack to make that plain.

Q73 **Baroness Fookes:** Lord Mackay, we agree that the role of the Lord Chancellor has changed, but do you still think that it is important that the current Lord Chancellors should have a legal, or at least a constitutional, background? If so, should the Act of 2005 be amended to reflect that as a requirement?

Lord Mackay of Clashfern: I remember having some discussion about this with my noble and learned friend. Some people think that the Lord Chancellor is better not to know anything about it until he becomes the Lord Chancellor and it is all new. What about the non-doctor who becomes the head of the Department of Health? That sort of illustration has been cited to me quite often. A person—not me—would be just as good as Lord Chancellor if they knew nothing about it and came along and was instructed by the Civil Service as to what they could do, and so on. I would not care to be in that position myself, but some people might be willing to take that on.

On the whole, if the Lord Chancellor's job is anything like what I had to do, it is highly desirable to know a bit about the constitutional and legal arrangements in the jurisdiction—that is, England and Wales—and also a bit about the way judges are appointed, and that sort of thing. Also, there are the day-to-day issues about the way the judges should be looked after and so on—for example, in relation to the residencies outside London, when they go on circuit. I had to deal with that kind of thing, but a person who knew nothing about it before would be able to deal with that just as well as I did. There is a wide variety, but, on the whole, I would prefer to see somebody who had a background in the constitutional or legal area as the Lord Chancellor, although it is possible that some brilliant person who was not from there would be just as good.

Baroness Fookes: Are there particular qualities of mind or approach that are important in a Lord Chancellor, as opposed to any legal or

constitutional expertise?

Lord Mackay of Clashfern: Being immersed in the legal situation at some level gives you a different way of looking at things if you are not a lawyer. I find it difficult to take myself out of what has been my life. I was a mathematician to start with but, having parted from that, I have been a kind of lawyer ever since. The sort of way that people look at it is very important, and it is helpful to the Lord Chancellor. Of course, the Prime Minister is looking for what he can get; it depends who is available. On the whole, if there is a statutory provision that has to be satisfied, that will confine the Prime Minister's search to that particular area and that may or may not be a wise restriction. I can see the benefit of it, but in some cases it might also be a hindrance.

There is an attitude that says that, whatever happens, the judges must carry on as they have done for 100 years. Some people think that—it is not my idea—and therefore you have to be careful. The background can be such that it restricts your width of view, and so I find it a little difficult. We had an argument about this, and I thought, on the whole, that there should be some kind of restriction on the qualifications, but it was fairly broad. You had to have experience, and most people have some sort of experience.

Lord Howard of Lympne: If you had a statutory requirement of that kind, you would open up the possibility of a judicial review of the appointment.

Lord Mackay of Clashfern: Yes. It would be difficult to carry that out completely, unless it was fairly broad.

Q74 **Lord Faulks:** I have a similar question in relation to law officers. Do you think that they should have particular qualifications, experience or, indeed, qualities that would render them appropriate for their posts?

Lord Mackay of Clashfern: On the whole, the Prime Minister should choose from among those available the one who is likely to be the most independent. It is important that what the Attorney-General has to do is identify what the law really is at the time as a result of the statutes and the judicial decisions and, if necessary, get advice from somebody else who knows more about it than he or she does, which is quite possible.

Lord Faulks: There is an argument that having a political appointee for Attorney-General—Prime Ministers are human beings; they might want to choose a law officer who they think may be more sympathetic to their policy aims—may be the enemy of getting dispassionate advice. Is there a case for appointing someone who is not a politician to serve as a law officer for a particular period?

Lord Mackay of Clashfern: That is certainly possible. I do not think there is any law that requires all the offices to be held by a Member of either House or Parliament. As I say, when I was appointed originally—it did not last long—I was not a Member of either House of Parliament.

It is important to realise what the job is. You are not there to advise on politics, and the political requirements may not be capable of being taken into account. For example—I had this as Lord Chancellor, although it is a different thing—the Home Secretary of the day decided that judges should be restricted in some sentencing. As you can imagine, that was not considered to be very desirable by some of the judges. They thought that their decisions should be free and they could decide what they wanted.

I suggested, as a way of dealing with that, that there should be a grant of an exception. That is a political decision in a way, but it is a legal decision about a way in which the attitude of the particular Home Secretary and the Government could be met. The Home Secretary very kindly agreed to do that, and of course it went through in Parliament in a way that it might not have done without that. That also made quite a reasonable rule that, if there were some very exceptional case, this particular limitation would not allow it.

The Attorney-General has sympathy with the Government. It is important in a way that the Attorney-General will look for a legal solution to the political problem. He or she is there not to do away with a problem—they cannot—but to see whether the law allows the thing to be done in a way that accords with what the Government want.

Lord Faulks: I do not think I will be able to draw you any further in view of your answers to Lord Robertson earlier. Could it be said that in order to have confidence in the advice given by an Attorney-General, it is probably better that he or she does not express too firm a political view lest it be thought that their advice was not quite as dispassionate as it ought to be?

Lord Mackay of Clashfern: To separate out the political view from the legal view is quite important. What I am doing, if I am the Attorney-General, is telling you what the law is, not telling you what the politics is—and that is the right thing. You can want what politics you like, but if it is not lawful it cannot be done. That is a very simple attitude that I describe.

Q75 **Lord Hope of Craighead:** Is it an advantage or a disadvantage for a law officer to be a Member of either the House of Commons or the House of Lords? You told us that, for a short time, when you were appointed Lord Advocate you were not a Member of the House of Lords, although my recollection is that we were told that you were going to be appointed.

Lord Mackay of Clashfern: Yes, that was the intention; that is right, but it does not follow. One of my predecessors as Lord Advocate did not want to have anything to do with politics, and he said so. He was still appointed but he took no part whatever in politics of any kind. I do not think he was made a Member of the House of Lords, for example. It is possible but it is not particularly easy for somebody to take that point of view. There is a degree of collaboration implied in being a fellow

politician, but the collaboration is restricted to what the law, as I see it, will allow.

Lord Hope of Craighead: I should like to reflect a little on what it meant to become a Member of the House of Lords. Is there a two-way process? First, you are gathering information by participating in the proceedings and getting to know people because you are a Member of the House and you can meet them in a place where you can all be together. It is also the process of being able to communicate your advice in a way that would be public and open to questioning, and so on. Is it a two-way process that, combined, produces an advantage without which you would be at a disadvantage?

Lord Mackay of Clashfern: Yes, I think that is true. It is not essential; I could give legal advice without being a Member of the House of Lords. It would not be very different from what I would give if I was a Member of the House of Lords; in fact it would probably be the same. There is something about it. Particularly in relation to the judiciary, it is very important to pick up the attitudes that are being expressed by the public. The judges are independent, but they are servants, like all of us, of the public. Therefore, the public attitude to the matter can be helpful, not necessarily completely to change what they want to do or how they are doing it but just to know it. For example, the attitude to having lady judges has changed somewhat. That is not a legal matter; it is a political matter in a way, but it determines what exactly you are doing as Lord Chancellor. One of those I nominated for the High Court has certainly gone to the top; so it was something that could be done.

The atmosphere of the judiciary at the time is of importance and has to be taken into account. A person who has that background, for example being a Member of the House of Lords or the House of Commons, is an asset.

Lord Hope of Craighead: Is there an advantage to either House? What I mean is, is it better for the Attorney-General to be in the House of Commons rather than the House of Lords?

Lord Mackay of Clashfern: The House of Lords is a perfectly reasonable place for the Attorney-General, too. Usually, the Attorney-General has been in the House of Commons. In more recent years, the Lord Advocate has normally been in the House of Lords, not that that means anything except what has happened—why, I am not sure.

Lord Hope of Craighead: From the point of view of gathering awareness of what is going on by participating in Parliament, really there is no difference between the two Houses?

Lord Mackay of Clashfern: Yes, I think that is true. It is easier to pick somebody and plant them in the House of Lords than it is to pick somebody and introduce them for the first time to the House of Commons.

Q76 Lord Robertson of Port Ellen: One of the things that the committee has been looking at is whether the law officers' advice should be published. It is a matter of public controversy just now. We have heard contrary views on whether it should be published or made public in any way. I wondered whether you had a view on whether it should strictly be kept private on the basis of advice to the Government. Could it be codified so that in certain circumstances, as in the case of armed conflict, it would be published?

Lord Mackay of Clashfern: I must say that on the whole I am rather in favour of trusting the public with information than trying to keep it private. For one thing, if you try too hard to keep it private, it is likely that some person who is agitated about making it public will be able to find some way of doing that. It is then a more extraordinary situation than if it was published in the first instance. There have been some illustrations of this in Scotland, for example, which I will not go into.

I was never very keen on having secret information. I have always thought that the public should know. The Lord Chancellor in my time had no leaks from the Department, except two mistakes: somebody put a letter into the wrong envelope and it went to the wrong place. The second one was that some agency person did not get a job, so she thought that some of the material that she was working on might be of interest to the public.

There are restrictions, but on the whole I rather go in favour of transparency. Certainly in relation to the question of conflict, it is important because, apart from anything else, senior military people have to know that what they are doing is lawful; otherwise, they might be in serious trouble, so they are entitled to insist. It is quite important to have our legal view on that published if there is no other difficulty that you can think of.

Lord Robertson of Port Ellen: It is a very clear view that is useful for the purposes of this committee. We have received other advice that suggested that these things should always be completely private.

Lord Mackay of Clashfern: I am assuming that the action that is taken has followed the advice. It is not so easy to deal with a situation if you had advice that says, "This is daft", but you go ahead and do it. I would expect the law officer to be looking for another job if that happened. On the whole, I am assuming in the question that you ask that the advice is advice that has been followed that you tell the public you have.

Lord Robertson of Port Ellen: Yesterday, Sky News was reporting that the First Treasury Counsel—the Government's independent barrister on nationally important legal issues—has not been consulted on whether the plans to overhaul the Northern Ireland protocol will break international law. It said that Sir James Eadie was not asked to give his opinion on this key point of the plan. Will you comment on that? Is that unusual or something that you would consider to be remarkable?

Lord Mackay of Clashfern: One has to remember that there is an elaborate legal service to government. The law officers are the ultimate responsibility. A good number of the matters that are referred to lawyers are dealt with at a much lower level; in a sense, not the Attorney-General, but the First Treasury Counsel and the Foreign Office have very, very good lawyers in their ranks.

If I was asked for something to do with, say, the Foreign Office—I had quite a lot of that in connection with the euro—it is only sensible to consult them. If someone in the Foreign Office is an expert on a particular subject, it is so obvious. Unless my attitude is that I think I cannot do anything wrong, I will go to whoever I think is more experienced than me to see what he or she has to say. It may affect my advice very much. If this is true, it is a pity, because it tends not to use a relevant asset.

Baroness Fookes: The view that you express about being open about the advice given is perhaps a minority one regarding the witnesses whom we have heard already. Can you see any circumstances where a law officer might feel inhibited in giving really frank advice if he thought it was subsequently going to be made public?

Lord Mackay of Clashfern: That is a matter for the person in question. My view is probably a minority one—in some quarters, certainly. I have always had the feeling that government is for the people. Generally speaking, important matters of government should be made plain to people. Things can happen that are required to be kept in private—for example, in relation to negotiations. Negotiations are often extremely delicate and the advice you get in that connection may be required to be kept private.

I am talking about a situation where no real requirement of privacy comes from any consideration of the advice itself. There is also the source of facts. Most legal opinion depends on facts, but whether you can be completely frank may depend on where the facts have come from.

That is why I say that my attitude is to try to make it as public as possible, but there are conditions that would make it very difficult to make it public if it depended on information that itself is private.

Baroness Fookes: Basically you would prefer openness but accept that there may be some occasions when that is not appropriate.

Lord Mackay of Clashfern: That is right. That is my attitude, and it has been consistently for as long as I can remember.

Lord Howard of Lympne: Others have suggested, Lord Mackay, particularly where the action of the Government might lead to litigation, that disclosure of the advice given by the Government, which might assess the strengths and weaknesses of its case, would place the Government at an unfair disadvantage compared with any litigant who wished to challenge the decision of the Government. Normally, legal

advice given to litigants is not disclosed to the other side. If, in the context of litigation, the Government's advice was disclosed, a litigant would have an unfair advantage.

Lord Mackay of Clashfern: Certainly if it is something that is going to be litigated. I was rather taking it that the advice in question was of a national character such as advice in relation to military action—that kind of thing. What I am really saying is that I certainly would not expect advice on litigation to be published until the litigation had finished; it might be important then—in relation to costs, for example. I am thinking of the sort of legal advice that was taken at the time of the war in the Middle East.

Lord Falconer of Thoroton: May I follow up on that, which is very interesting? I understood you to be talking about whether it was legitimate for the country to go to war or to use armed force, not go to war. Did you have experience of decisions like that when you were the Lord Advocate? I think you might have been the Lord Advocate at the point of the first Gulf War, or am I wrong about that?

Lord Mackay of Clashfern: The Attorney-General was responsible for the external advice. I was responsible for Scots law and, at that time, European law, because it was law in the UK. I was not responsible for any international law; that was the Attorney-General's responsibility. As far as I remember, I did not give any view about that. I have had views since about some of the things that happened, but not at the time.

Lord Falconer of Thoroton: The Attorney-General has to express a view about whether it is legitimate to use force at a particular time. We heard Lord Keen of Elie's view that sometimes what the law officers have to say is that, if there is a respectable argument that something is legitimate, that is sufficient to justify the particular course. Would you take that view in relation to the use of force, or should the Attorney-General express what is his or her best view on the law regarding whether it is legitimate?

Lord Mackay of Clashfern: I hesitate to differ from Richard Keen, who is an extremely able and very experienced lawyer. The lawyer who says, "on the one hand and on the other hand", strikes me as, on the whole, not the best person to seek advice from. If you are faced with the question as to whether this is lawful or not, I regard it as my responsibility to reach a view as to what the law is on that or whether it was justified.

One of the things you and I have to remember is that a good lot of this depends on facts, and the facts that you are told may turn out not to be true, in which case the advice you gave is not valid. It is not because it was wrong at the time; it is because the basis on which it was asked for turned out to be wrong. My previous answers are, of course, dependent on that.

If you look at the situation about the weapons of mass destruction in Iraq and whether that was a basis for advice, you are in difficulty. You would have to say that was the basis of the advice if it was to be made public. In that situation, the facts that come along may derive from the Secret Service and it may not be possible or wise to tell what the Secret Service told you in case it may be wrong.

Lord Falconer of Thoroton: You have described the circumstances in which you became Lord Chancellor. Your two predecessors, Lord Hailsham and Lord Havers, were both distinguished lawyers and distinguished politicians. Both of them had had experience in the House of Commons. Do you think that you did the job in a different way from them?

Lord Mackay of Clashfern: Probably—very different, probably.

Lord Falconer of Thoroton: As you described, you came to the job effectively as a non-politician. I know you had experience as a Lord Advocate, but you are much less experienced in the political field, as you would be the first to say. Does that make the doing of the job different?

Lord Mackay of Clashfern: I do not know. I know the attitude that some of my predecessors had expressed to one of the issues that I had to deal with—namely, whether solicitors should get a right of audience in the Supreme Court and in the higher courts generally. I came to that at a time when it was still an issue.

The Bar and the Law Society had agreed to set up an independent committee, chaired by Lady Marre, to decide this question. The committee consisted of 10 solicitors, 10 barristers and 10 independents, as I remember. When they came to issue their judgment, the 10 solicitors and the 10 independents wanted rights of audience. The 10 barristers seemed not to want it. That seemed to me to be an important political fact, which people before me were not aware of. They had formed their view before they had the benefit of listening to this committee's ultimate decision.

Being a very experienced politician can sometimes affect the attitudes that you have to political questions in a way that is less flexible in those who in any proper sense are not politicians. Although I have been a Member of the House of Lords and Lord Advocate, I never regarded myself as much of a politician at all. I have regarded myself as somebody who tries to serve the state as best I can with such reserves of experience as I have. A lady in the Lords recently described me as a wily old politician. She was probably right in talking about me as old, but certainly not as a politician.

Lord Falconer of Thoroton: Wily?

Lord Mackay of Clashfern: That is just an example of maybe a misnomer.

I agree that it may have made a difference; probably it would have done. Of course, there were also members of the English Bar, which made a difference as well.

Q77 Lord Falconer of Thoroton: Do you think that the Attorney-General's oath needs to be updated? Should it include specific reference to the rule of law? The Attorney-General's and the Solicitor General's oath in England says, "I will use all my cunning in support of the Crown". It does not mean very much either to the outsider or to the lawyer. "Cunning" does not mean, "I will be clever and wily"; it means, "I will use all my skill as a lawyer". Does it need to be updated so that people can see what the role of the Attorney-General is?

The Chair: Before you answer that, there are a couple of outstanding questions on the legal advice point, but we will come back to it. Let us carry on with that question. I am just indicating that to the committee.

Lord Mackay of Clashfern: My view is that the responsibility of the Attorney-General is to advise on what the law is. If you care to make that the way in which the oath is framed, that seems to me to be right. I do not think that the Attorney-General has, as an essential part of his or her office, to respect the rule of law. The Government are the Executive with that responsibility. It is what you do, and the Attorney-General, in my view, is an adviser. Therefore, the advice has to be what the Attorney-General truly believes is the correct view of the law relating to the question at the present time.

Lord Hope of Craighead: Pursuing that a step further and reflecting on what Lord Keen was talking about, does something depend on the question that has been put to the law officer? The way in which Lord Keen was contemplating it was that the Government have determined on a particular policy that they wish to adopt and, having formulated their policy, they then say to the Attorney-General, "Can we go ahead with this?" It is in that situation in which Lord Keen was saying that there is a respectable argument, although the better argument is to the contrary. Do you recognise that as a proper way to proceed?

Lord Mackay of Clashfern: I think I know what Lord Keen was talking about. The question is whether the law is sufficiently definite. If it depends on facts, a good deal depends on how well the facts are established. If you have proof and the facts are disproved, or the chap in cross-examination forgets what he is supposed to say, then it does make a difference.

If the facts are stated, I would like to believe that I can say what I think the law is. The Supreme Court may take a different view, for all I know, although on the whole that is why you are there. If you are always getting it wrong, your chances of continuing in practice will be affected.

I always said, for example, that in choosing Silks it is not just a question of very eloquent advocates, but people who give good advice that, when acted on, turns out to be right. That is quite important. I can see that

what Lord Keen was saying was appropriate to the particular situation in which they were placed.

One of the things is: what will be the result of a negotiation? If that is part of the facts, it makes it quite difficult to form an ultimate view of the law. The connection between the law and the facts is very important. I was thinking, in answering the previous question, of a situation where the facts had been established.

Lord Hope of Craighead: That is very helpful, thank you very much. That helps to set the scene for us looking back at what Lord Keen was saying.

Lord Mackay of Clashfern: Yes.

Lord Robertson of Port Ellen: May I take you back to yesterday's Sky News report about the First Treasury Counsel not being consulted on the Northern Ireland protocol and whether it breached international law? Is it possible that the Government can get round the inconvenience of getting legal advice that they do not like simply by not consulting the likes of the First Treasury Counsel? Sky News is reporting that he is nevertheless understood to have indicated that he believes it will be very hard for the UK to argue that it is not breaching international law if it goes ahead with some of the moves under consideration. Are the law officers obliged to consult people such as the First Treasury Counsel on something that is about to come up in Parliament in the next couple of weeks?

Lord Mackay of Clashfern: Needless to say, I am not very familiar with the sort of circumstances that you refer to. It is very important that the Government should seek to proceed according to the law. I have looked very carefully at the Northern Ireland protocol from time to time. The question of whether it is a breach of international law depends a good deal on the interpretation you make of the protocol itself. The Belfast agreement is a fundamental part of that.

My view has been that you must get a construction of the whole document that is consistent, and that is not easy to do. To say that it is a breach of international law, without having established that particular aspect of it, is quite—anyway, I am not criticising the First Treasury Counsel's view, which I am sure is very well founded. It is difficult to know, but it is the responsibility of the Attorney-General, if the question is put to the Attorney-General, to say what the law is.

Lord Faulks: I come back to this "respectable argument" point. With the purported prorogation of Parliament, the facts were not really in doubt; the issue was whether it was lawful or not. We do not know precisely what the Attorney-General advised, but we do know that the Divisional Court unanimously decided that it was a matter of politics, not law, and its decision was reversed by a unanimous Supreme Court.

How does that fall into the "respectable argument" or "what is the law" point that you were describing earlier? Presumably, the Attorney-General

could have advised that he thought it was perfectly lawful for the Prime Minister to prorogue.

Lord Mackay of Clashfern: He has given the law as he thought right. Nobody can say, "This is going to be decided this way", unless he is a prophet, and there are not too many of them around. What you have to do is say what you believe the law is and make the best judgment you can on that. If you believe that and if the Supreme Court decides against you, you will know why it was wrong.

Q78 **Baroness Fookes:** The Prime Minister as an MP and as a Privy Councillor takes oaths. Is there any merit in the Prime Minister being asked to take an oath when he assumes office?

Lord Mackay of Clashfern: I am not sure what exactly the oath would be. He has an oath as a Privy Councillor and an oath as a Member of Parliament. If you are fit to be a Member of Parliament, presumably you are also fit to be a Prime Minister if and when your friends choose you.

I find it hard to formulate the new oath that the Prime Minister might take. I can imagine what some people would like to see, but I do not think it is very practical somehow. If somebody formulates it and it sounds good, then I do not oppose that, but I would not wish to suggest it myself.

Lord Falconer of Thoroton: You said a few moments ago—in my view, rightly—that the Attorney-General is an adviser; it is the Government who must adhere to the rule of law.

Lord Mackay of Clashfern: Yes.

Lord Falconer of Thoroton: Would it be worth while for the Prime Minister to swear an oath that he will serve the nation faithfully and adhere to the rule of law?

Lord Mackay of Clashfern: As this book shows, the definition of the rule of law is quite difficult, especially when you come to international law. It very much varies according to the kind of law it is. Treaties and the ordinary international law, which is supposed to be of consent between the nations, are all a little different.

This book shows, and we all know it is so, that exactly what is involved in the rule of law is very much a matter of discussion in relation to the particular subject matter, particularly when it comes to international law. Therefore, I am rather anxious about it.

Lord Falconer of Thoroton: I agree that there are issues about the margins or maybe bits of the rule of law, but there are no real issues about the obligation of the Government to comply with, for example, the criminal law and all the accepted parts of the law. It would be wrong for a Government knowingly, for example, to infringe somebody's rights because it was convenient politically. It would be wrong for the Government to break the criminal law because it would be convenient. I

am talking about the Government here, not individuals.

Surely it must be worth while for the Prime Minister to commit himself or herself to compliance with the rule of law. Yes, there might be debates about what was on the margins in relation to it, but all that the Government do in those circumstances is honestly do their best to try to comply with the rule of law. If there is disagreement, there is disagreement. We focus often too much on the contested parts when there are lots and lots of uncontested parts of the rule of law.

Lord Mackay of Clashfern: Yes, but if you put it in the oath, it includes the contested as well as the uncontested and there you are in a difficulty. On the whole, I am not inclined to suggest vows that are based to any extent on any kind of ambiguity. The judicial oath, for example, that I have administered to many people here is extremely clear. Any oath that the Prime Minister takes should be equally clear and definitive in all its aspects.

Lord Falconer of Thoroton: We do it with witnesses. "Tell the truth and do my best to comply with the rule of law".

Lord Mackay of Clashfern: It is not for me to suggest what should happen. On the whole, I am not very keen on oaths that are not very, very plain. An illustration has come into my mind in relation to some of the things that happened in the Gulf.

Baroness Fookes: Is it correct that the First Minister in Scotland takes an oath?

Lord Mackay of Clashfern: Yes, it is. I think I am right in saying that the officers in Scotland are appointed by Parliament and take an oath.

Lord Hope of Craighead: Before the Court of Session?

Lord Mackay of Clashfern: Yes.

Lord Hope of Craighead: The First Minister appears before the judges in the Court of Session?

Lord Mackay of Clashfern: Yes.

Lord Robertson of Port Ellen: In addition to her oath as a Privy Councillor and in addition to her oath as a Member of the Scottish Parliament, she does it supplementary to all these existing oaths.

Lord Mackay of Clashfern: Yes. I am not sure what difference it has made, but that is a matter of opinion.

The Chair: Let us not go there.

Q79 **Lord Hennessy of Nympsfield:** May I link Baroness Fookes's first question to you in this section with your desire perhaps for greater precision about what a prime ministerial oath might involve? Earlier, if I understood you rightly, you were advocating a stiffening of the Ministerial

Code by putting a degree of independence in it.

I do not know whether you agree with this, but I tend to regard the Ministerial Code as one of the most important vertebrae in the spinal cord of the British constitution. This is my very individual view, but anything that stiffens its salience to a Prime Minister, particularly a Prime Minister who may not be oversensitised to the niceties of the conventions of the constitution, would be a good thing.

If the oath included, for example, a recognition that he or she as a new Prime Minister became the guarantor of those codes that relate to the decencies and probities of public and political life more widely, it just might increase the chances—you might think I am hopelessly naïve—even with the most roguish, Mr Toadish sort of Prime Minister we might get, heaven forbid, that they would think twice before riding roughshod over the conventions, if they had sworn a solemn oath before the entire House of Commons and, therefore, to the whole nation.

Lord Mackay of Clashfern: I can see the force of that, particularly in present circumstances, but I am not certain that I would want definitely to make that more of a rule than it should be. On the other hand, our constitution, as you know, is remarkably fluid in some aspects. There is something to be said for making it more secure than it is, and that is really what you are saying.

Lord Hennessy of Nympsfield: It is, yes.

Lord Mackay of Clashfern: I can see that. I just feel a little anxious about getting involved in too much laying down of the law, as it were, in a situation that is particularly tricky to my mind and a situation that I was not faced with.

The Chair: Thank you very much. We have exhausted our questions. I thank you for sharing your considerable knowledge with us today and the wonderful mix of stories, and a twinkling touch of humour that even had an outburst of laughter around the committee. Thank you very much for that and we will certainly reflect on what you said.

Lord Mackay of Clashfern: Thank you very much. I am sure it should be corrected in various ways, but I do not propose to do that. I recommend this little book to anybody who has not had a chance to look at it as Lord Bingham was really somebody very special in my view, whether or not that was the general view.

Lord Falconer of Thoroton: I could not agree more.

The Chair: Thank you.